Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANTISEK BENES, P.E.

Petitioner

vs.

CITY OF DALLAS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

For issues on which Defendant did not move for summary judgment and on which the Court did not rule, are the Plaintiff's due process rights in discrimination and retaliation charges preserved on such issues although the court granted summary judgment only on certain issues and closed the whole case, without addressing a central issue of the Plaintiff's case?

In determining whether to grant summary judgment as a matter of law under Fed. R. Civ. P. 56, is a district judge's function to identify and decide materially factual disputes, including the determination whether the Defendant's alleged reason for its action is true or false, and effectively decide the merits of a case based upon these factual decisions?

Under the continuing violation doctrine, when Defendant creates internal procedure of growth pay promotions and fails to follow the written procedure in a particular case, is the unlawful employment practice of failing to promote every day a continuous violation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Frantisek Benes, Petitioner

City of Dallas, Respondent

Attorney of record for the Respondent:
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Dallas, Texas 75201

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not reported, is set out at pp. 2-3 of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The Order on Petition for Rehearing appears at Pet. App. p. 4. The order of the District Court, which is not reported, appears at Pet. App. pp. 5-35. The order of the District Court denying Motion to Reconsider, which was not reported, appears at Pet. App. pp. 36-40.

JURISDICTION

The U.S. Supreme Court has jurisdiction of this case pursuant to 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was entered on October 28, 2002. A timely petition for rehearing was denied on November 26, 2002. On February 27, 2002, the District Court entered a Summary Judgment in favor of Defendant, City of Dallas.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Civil Rights Act of 1866 and 1871 (as amended by the Civil Rights Act of 1991), 42 U.S.C. § 1981; 42 U.S.C. §§ 1983 and 1985; U.S. Constitution, Article III and Const. Amendments V, VII and XIV; Fed. R. Civ. P., Fed. R. Civ. P. Rule 59 and 60.

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., (Title VII), is set forth below:

"§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer: (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."

The 42 U.S.C. § 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and the full and equal benefit of all laws and proceedings... as is enjoyed by white citizens..."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be ..., nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Const. Amend. V. It

contains an implicit guarantee that each person receive equal protection of the laws.

The Seventh Amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "All persons ...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Const. Amend. XIV.

U.S. Constitution Article III. The magnitude of multiple factual disputes in multiple charges over many years, as in this case, cannot be effectively settled by a decision of an Article III judge on summary judgment.

STATEMENT OF THE CASE

Petitioner, Frantisek Benes, brought this national origin discrimination, age discrimination, and retaliation suit against the City of Dallas as a result of many years of continuous compensation (pay) discrimination, several non-promotion claims, and retaliation.

Over the years, Benes, regardless of his SUPERIOR performance ratings, superior qualification, and implementation of significant cost savings of hundreds of thousands of dollars, has received a discriminatory pay in every position where he actually worked, and received discriminatory merit raises compared to similarly situated employees. In addition, over the years, he was denied regular promotions for open competitive positions, regardless of the fact that he demonstrated superior qualification and superior performance record. When he

was eventually promoted after 1991, it was only because changes were implemented across the board over time as growth non-competitive slotting. However, even in this case of an across the board program, this opportunity given to others immediately was discriminatory delayed for three years for Benes; and after this delay Benes still received a discriminatory salary of $20,000 a year less than similarly situated employees.

City of Dallas requested and received on February 26, 2002, a summary judgment exclusively on several non-promotion claims. Court entered summary judgment before Mr. Benes had an opportunity to conduct adequate discovery. Benes vigorously demanded pay, promotional, and other information on comparable employees which were necessary to adequately prove his case and respond to defendant's motion for summary judgment. This is evidenced from documents on file attached to Plaintiff's Motion to Abate Ruling on Defendant's Motion for Summary Judgment Until Defendant Fully Complies with the Plaintiff's Open Record request and to Supplement Plaintiff's Response to the Defendant's Motion for Summary Judgment, filed July 31, 2001. Benes wanted to compare his discriminatory treatment to other similarly situated employees which would create additional genuine issues of material fact as to whether similarly situated employees were treated differently. This would affect the outcome of the suit under the governing law. The City of Dallas never reasonably complied with Mr. Benes' timely discovery request. Plaintiff's motion to abate ruling on Defendant's motion for summary judgment was denied by the District Court without an explanation at the same time as the summary judgment ruling on February 26, 2002 (Pet. App. p. 5). Plaintiff's Motion to Reconsider Final Judgment Order and Final Judgment dated February 26, 2002, and/or Motion for New Trial was denied as untimely on May 15, 2002, because of ineffective assistance by Benes' counselor. This was done although Benes' affidavits were provided as

follows: 39 pages of disputed facts in Affidavit 3/20/2002, 70 pages of disputed facts in Supplemental affidavit 4/1/2002 (6R 690-728, 6R 751-761).

Appeal was denied on October 28, 2002, by Fifth Circuit Court of Appeals. The Appeal Court only affirmed District Court's ruling on Non-Promotion claims, filed February 26, 2002, and spoke as to nothing else. The Fifth Circuit Court of Appeals has entered a decision in conflict with the decisions of other United States Court of Appeals that concern the same matter. Furthermore, if Appeals Court's reviewer "carefully reviewed" Benes' case (5th Cir. ruling October 28, 2002 - Pet. App. p. 3) he would, at a minimum, realized that there is only one amended complaint and not "**various amendments** to his Complaint." (Bold added). A timely petition for rehearing was denied on November 26, 2002.

Petitioner Frantisek Benes now petition Supreme Court on Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The District Court erred in removing a live charge of discrimination and retaliation from the Court's docket. Frantisek Benes' right for due process of the law in discrimination and retaliation charges on issues to which the Defendant did not move for summary judgment and to which the Court did not rule are preserved even though the Court granted summary judgment on the remaining issues and in error closed the whole case.

A) The Court departed from the accepted and usual course of judicial proceedings. The District Court did not follow the mandatory authority, which it was bound to follow. My statutory rights and requirements of the Federal Rules of Civil Procedure cannot be changed or abolished by judicial interpretation.

1) An employment discrimination complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), Fed. R. Civ. P. 8(a)(2). This standard was fully satisfied in my complaint on the issue of compensation discrimination, yet the claim was never adjudicated.

2) The complaint adequately stated Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.

3) My above statutory rights and requirements of the Federal Rules of Civil Procedure cannot be changed or abolished by judicial interpretation. Changes can be obtained only by the process of amending the Federal Rules or Statutes. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (citing Leatherman v. Tarrant County, 507 U.S. 163, 168 (1993)).

4) Additionally, the Fifth Amendment of the U.S. Constitution has an explicit requirement that the federal government not deprive of "life, liberty, or property," without due process of the law. It also contains an implicit guarantee that each person receive equal protection of the laws. My right for trial by jury is also preserved by Amendment VII of U.S. Constitution which states: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

5) To receive summary judgment under Rule 56 of Federal Rules of Civil Procedure, the party must first move for summary judgment. Additionally, in motion for Summary Judgment, the moving party bears the burden of informing the District Court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. Celotex Corp. v. Catrett, 477 U.S. 317, 323

(1986). Defendant City of Dallas did not satisfy any of those requirements. Therefore, deliberately granting the summary judgment on my compensation/pay discrimination charge, in absence of defendant's motion, would be in conflict with mandatory authority of established constitutional, statutory and common laws, and principles of Fed. R. Civ. P. The District Court is bound to follow the above mandatory authority.

6) I should be afforded the opportunity to present the jury question for determination of whether Defendant discriminated, intentionally discriminated, and retaliated in pay; whether the City's previous reason for its action is true or false and questions of liability of health and other damages caused by Defendant's unlawful action. I should be afforded the opportunity to show the jury: falsity of Defendant's previous justifications; that the reasons the employer previously gave for the action it took against me is in fact only a concocted excuse for discriminating and retaliating against me because of my national origin, age and protected activity; that Defendant did not follow established and usual procedures and advertisements; others received differential opportunities and treatment in similar situation; I should be afforded the opportunity to cross-examine affiants, employees and managers. I should be afforded the opportunity to show the jury how persistently I, all the time, notified management about the existence of disparate treatment in pay, and present evidence of their ignorance to this issue. I should be afforded the jury's examination of motive, intent, and credibility, which involves delving into the state of mind of employees, and otherwise prove my charge. I should be afforded the opportunity for fair discovery process and fair opportunity to show that Defendant's Affidavits were made in bad faith.

B) Both the District and Appeal Courts' Opinion ignored the fact that there is a live charge of "compensation

(pay) discrimination, discrimination in merit decisions and discrimination in pay because of my accent " in the District Court on which Defendant did not move for summary judgment and on which the District and Appeal Courts did not rule. The Appeal Court refused to give me even a minimum explanation or any reasoning behind their ruling as to why my timely legal and live charge was omitted. The Appeal Court just affirmed District's Court decision without any explanation. However, in the District Court's ruling there is nothing about my timely legal charge of "compensation (pay) discrimination." District Court exclusively ruled on Non-Promotion claims (See: "III. Non-Promotion Claims", pages 11-25 in original ruling, and Pet. App. pp. 15-29). Thus this Summary Judgment ruling effectively denied me the right to trial by jury or even a judgment on compensation discrimination even though the Court did not rule on it.

My timely charge in the District Court for compensation (pay) discrimination with associated Title VII retaliation claim was not challenged by the defendant City of Dallas. Defendant City of Dallas did not exercise their right for pretrial motions; motion to dismiss and motion for summary judgment on this charge. Therefore, after requesting and receiving Summary Judgment exclusively on the Non-Promotion claims, there is still the live charge of compensation (pay) discrimination in the District Court. The Appeal Court only affirmed District Court's ruling on Non-Promotion claims and spoke as to nothing else.

The pay discrimination claim is my major issue against the City of Dallas, which was properly included in my lawsuit, along with several Non-Promotion claims for which Summary Judgment was granted only. Nevertheless, these issues for which Summary Judgment was granted were less important secondary issues only.

Because the defendant did not asked for summary judgment on this remaining charge and the issue has not been terminated by dismissal, summary judgment, or

settlement, it must be set for a trial in accordance with Federal Rules of Civil Procedure. I properly and timely filed the lawsuit in the District Court against my employer City of Dallas, alleging claims of compensation (pay) discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Civil Rights Act of 1866 and 1871 (as amended by the Civil Rights Act of 1991), 42 U.S.C. § 1981; 42 U.S.C. §§ 1983 and 1985, and the 14th Amendment to the United States Constitution.

In this case, counting only pay periods after May 4, 1998 until today, I received approximately 122 discriminatory paychecks, which created discriminatory underpayment of approximately $93,000 compared to similarly situated employees. My salary as Senior Engineer 57 on March 24, 1998 and September 24, 1998 were set at a discriminatory level compare to similarly situated employees; similarly as it was done before March 24, 1998. In addition, the Defendant used this discriminatory salary as the basis for determining merit, cost of living and annual increases, which caused me to continue to make less than similarly situated employees.

In the District Court's ruling dated on May 15, 2002, the Court stated on page 4: "Nevertheless, in its previous order the Court specifically found that Benes could not employ the continuous violation theory to resurrect claims about pay discrimination concluded in the past, even though its effect persisted. See Mem. Opinion & Order at 12-13". First, the Court here tries to unfairly redress its ruling on page 11-13 (Pet. App. pp. 15-17) of Summary Judgment which was exclusively made only on "III. Non-Promotion Claims" and not on my separate Compensation/Pay discrimination charge. Second, on page 13 (Pet. App. pp. 16 and 17), the Court specifically ruled only on Non-Promotion: "Therefore, as a general matter, any potential claims arising out of Defendant's alleged discriminatory motivated non-promotions, shall be considered time bared if they occurred

prior to December 5, 1997, and May 4, 1998 (300 days before the filing of Benes' first two EEOC charges on October 1, 1998 and February 26, 1999, respectively)." (underline added) Third, the test is not whether my timely charge of Compensation/Pay discrimination should include the time after May 4, 1998 but also before this date. The issue is that the Defendant City of Dallas did not exercise their right for motion for summary judgment on this charge. Therefore, after requesting and receiving Summary Judgment exclusively on Non-Promotion claims, there is still a live charge of compensation (pay) discrimination in the District Court. My right for fair trial by jury on this issue cannot be abolished by judicial interpretation.

My charge of continuous pay discrimination is included in my EEOC charge dated February 26, 1999, item I a) and is marked as "Continuing Action" from 01/20/1989 until date of charge of 02/26/1999 (Plaintiff's Appendix ("Pl's App.") at 3 and 4 and Defendant's Appendix ("D's App.) at 143 and 144). I received a Right to Sue Notice for this claim on 02/26/1999 (Pl's App. at 5 and 6 and D's App. at 145 and 146). My charge of pay discrimination is included in my Amended Original Complaint on pages No.: 4 bottom, 5 top, 5 bottom, 6, 7 (item 12), 10 (item 16, last paragraph), 17 and 18 (item 21), 24 (line 10 - end), 25 (first paragraph), 29 and 30 (item 30), 30 and 31 (item 31). My charge of continuous pay discrimination was also discussed in depositions (3R - D's App. at 41, page 42, line 1-8; at 41, page 44, line 1-4; at 43, page 50, line 11-13; at 43, page 52, line 11-25; at 44, page 53, line 1-9; at 44, page 54, line 16-23; at 44, page 55, line 11-17; at 45, page 57, line 1-7; at 79, page 63 line 2-25).

The Court granted Summary Judgment Order only for a selective portion of my claims, the Non-Promotion Claims (pages 11-25; Pet. App. pp. 15-29). In addition to Non-Promotional Claims, I made a separate charge for a pattern of continuous pay discrimination since January 1989 until the present. For every employment position I worked

in since 1989 until now, I was given the minimum allowable salary, which is designated for employees without experience or with minimum experience at that position. My salary as Senior Engineer 57 on March 24, 1998 and September 24, 1998, were set at a discriminatory level compared to similarly situated employees; as it was similarly done before March 24, 1998. This was done despite my extensive engineering experience in water and wastewater coupled with a Masters Degree in water and wastewater and excellent work performance. Currently, because further discrimination and retaliation still continues, I am paid approximately $20,000 a year less than any other comparable employee within the Senior Engineer classification. This discrepancy exists even though I can demonstrate that I am a highly qualified and experienced licensed engineer with excellent performance record. Nevertheless, I am the lowest paid senior engineer within the entire capital improvements group. My salary is $66,364.92, while engineers with comparable education and experience are paid as follows: Adams (B.S. 5/74, $87,801.48), Hardy (DOB*2/19/53, $86,137.08), Rezai ($86,967.36), Taylor (*7/3/51, B.S. 5/74, $84,466.92), Saldana (*12/29/48, $86,551.20). Even engineers that are between six and thirteen years younger than I, thereby naturally having significantly less experience, are paid notably higher. The following are some examples of these employees: Fitzwilliams (*5/14/57, B.S. 8/84, $86,967.36), Mumm (*7/30/57, B.S. 5/82, $86,437.32), McCachern ($81,600), Hines (*11/18/58, B.S. 5/83, $81,330,96), Cottingham (*7/10/61, $80,390.76), Rastegar (*11/1/64, $80,276.16), Culton ($75,838.56), Tawana (*8/27/59, $74,954.88), Barina (*4/14/58, B.S. 6/82, $73,599.36), Nolen (*9/19/60, $67,602.00) (Asterisks indicates Date of Birth). Even employees who are without a college degree are, or were, paid better than I am as seen from the following: Gremminger ($72,658.56), Shreve ($72,241.68), Caraveo ($71,581.92), Grabinski ($68,640.48). Yet for discriminatory

reasons, I with twenty-six years of licensed engineering experience directly in the water/wastewater; with a master's degree in water/wastewater engineering; and the excellent work performance, am paid as an engineer with only five years of licensed engineering experience and with only a bachelor's degree. For example, Dan Nolen received his B.S.C.E. in May of 1991 (as oppose to my M.S.C.E. in 1975); nevertheless, he was promoted to Engineer 56 in August 1997 and is now paid higher than I am. Yet, the City advertises salary levels as "depending on experience" or more recently as "depending on qualifications." (Pl's App. 25-29) But, clearly their written policy does not apply to me for discriminatory reasons.

My timely charge in District Court of compensation (pay) discrimination was not challenged by the defendant City of Dallas. Defendant City of Dallas did not exercised their right for pretrial motions on this charge. The District Court is bound to follow the mandatory authority and by Fed. R. Civ. P. and allow me to process with my remaining live charges.

II. The District Court erred in its application, and, hence, granting of summary judgment. In determining whether to grant summary judgment as a matter of law under Fed. R. Civ. P. 56, district judge function is not to identify and decide material factual disputes, and not to decide the merits of a case based upon these factual decisions. A district judge's function is not to determine whether the Defendant's alleged reason for its action is true or false, that is a jury function.

A) The courts have held that when questions of motive, intent, retaliation or credibility are involved, as are in my multiple charges, summary judgment is inappropriate. It has long been established that it is inappropriate to resolve issues of credibility, motive, and intent using the pretrial motion of summary judgment Arnstein v. Porter, 154 F.2d

464, 469 (2nd Cir. 1946). As Justice Rehnquist stated in his dissent in Hardin v. Pitney-Bowes, Inc., 451 U.S. 1008, 1010 (1981): "Summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned. Thus in any suit where the defendant is not accorded absolute immunity, so that the defendant's state of mind is at issue, it will not require an ingenious advocate to force a trial of the case." Similarly, whether a "discriminatory motive" exists is an issue for the jury. Hunt v. Cromartie, 526 U.S. 541, 552, 119 S.Ct. 1545, 1552 (1999). It was error for District Court tc resolve the disputed fact of discriminatory motive at the summary judgment stage. Furthermore, employer's intent is a factually disputed matter precluding summary judgment in Title VII retaliation action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. R. Civ. P. 56(c), 28 U.S.C.A.

B) The Court refused to recognize that a determination of whether the Defendant's alleged "reasons" for its multiple actions are true or false, which are disputed factual issues for the jury to resolve. Court refused to recognize the basic cornerstone of litigation: questions of fact are to be resolved by the jury and questions of law by the judge and if there are disputed material (pertinent) factual issues, the case must go to trial before a jury. "The very essence of [the jury's] function is to select among conflicting inferences ..." Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 (1944). "Credibility determinations, the weighting of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150-151 (2000) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's. (See sections F, G, H, I, and J) It is only when the pertinent facts that underline the claim of discrimination are not

disputed by parties, that a judge may apply the applicable law to these facts and decide the case. In this case, the continued discrimination over a decade of years present pertinent factual disputes, which sharply differ on every major issue, and thus were improperly decided by the judge on summary judgment. In employment discrimination cases the material (pertinent) facts are almost always in dispute, as it is disputed in my multiple issues. Therefore, in employment discrimination cases, summary judgment motions should not succeed very frequently. Sometimes, as in this multiple charges however, they do succeed because judges exceed their mandate to simply identify material factual disputes, and affectively decide the merits of a case based upon their own perceptions. Supreme Court precedent is currently acute to regulate the dangerousness of robust use of summary judgment in some courts to clear trial dockets; to prevent solving factual disputes by those judges who go beyond their very limited function in ruling on summary judgment motions and to protect original intent of the Civil Rights.

C) By the use of Summary Judgment, I was denied the opportunity to present the jury questions to determine whether Defendant's discriminated, intentionally discriminated, retaliated; whether the City's reasons for its action are true or false; and questions of liability of health and other damages caused by defendant's unlawful action. I was denied the opportunity to show the jury: falsity of defendant's justifications; that their Affidavits were made in bad faith, that reason the employer previously gave for the action it took against me is in fact only a concocted excuse for discriminating and retaliating against me because my national origin, age and protected activity; that defendant did not follow established and usual written procedures and advertisements; that others in similar situations received differential opportunities and treatment; I was denied the opportunity to cross examine employees and

managers, and I was denied fair discovery process and to otherwise prove my case.

D) The multiple factual issues in multiple charges, as in this case, cannot be effectively settled by a decision of an Article III judge on summary judgment. In this period of rapidly changing and conflicting views of appropriate relationship in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment to U.S. Constitution. The Court refused to permit a jury to infer Title VII and age discrimination from the facts that after Mr. Benes' rejection, employer continued to seek and hired younger, less experienced, less qualified, outside applicants with a different national origin, for pretextual reasons; or from Mr. Benes' other indirect evidence (See Benes' deposition record 3R - D's App. pp. 3-105).

E) The Court has so far departed from the accepted and usual course of judicial proceedings. The, fifth Circuit Court of Appeals has entered a decision in conflict with the decisions of other United States Court of Appeals that concern the same matter. In other Courts of Appeal, it has long been established that it is inappropriate to resolve issues of credibility, motive, and intent using the pretrial motion of summary judgment Arnstein v. Porter, 154 F.2d at 464, 69 (2nd Cir. 1946). It is equally clear that where such issues are presented, the submission of affidavits or depositions is insufficient to support a motion for summary judgment. For example, the Court of Appeals for the Second Circuit fully explored the circumstances in which summary judgment could be granted and concluded that "[a]lthough part of plaintiff's testimony on deposition...does seem 'fantastic' yet credibility, even as to those improbabilities, should be left to the jury." Arnstein, 154 F.2d 464, 469. In the spring of 1998, the Federal Appeals Court for the 2nd Circuit ruled that jurors, not judges, are best qualified to silt through

the "rapidly changing and conflicting views" of relations in the workplace. The Court of Appeals said that "whatever the early life of a federal judge, he or she usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." Gallagher v. Delaney, 139 F.3d 338, 342 (2nd Cir. 1998). "But in ruling on a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." Hunt, 526 U.S. at 552 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). The Court in my case exceeded its mandate by taking the place of a jury as factfinder, identified multiple material factual disputes, and decided the merits of a case based upon its own perceptions. The Court ignored evidence of strong prima facie precedents on discrimination; multiple material factual disputes; falsity of defendant's justification as to the reasons for discriminatory treatment; questions of credibility, motive, intent; questions of intentional violation; and question of title VII retaliation claims. Prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates a jury issue of whether employer intentionally discriminated. Reeves, 530 U.S. 133, 38. As Justice Ginsburg, concurring in Reeves, 530 U.S. 154, 55: "The Court today holds that an employment discrimination plaintiff may survive judgment as matter of law by submitting two categories of evidence: first, evidence establishing a prima facie case...and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its action was false"...and "...the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above."

F) The Court's own perception stating that Plaintiff has failed to establish a prima facie case of discrimination for Senior Engineer 57 position, specifically that the *Plaintiff was not qualified for a job, is a factual error* (Pet. App. pp. 22 and 23). Court's improper decision about material disputed fact were again incorrectly decided in favor of Defendant and conflict with Court's own acknowledgement that "Benes asserts that he was certified as eligible for final Engineer 57 pay level by the ..." - Pet. App. p. 8. Furthermore, the Defendant has a legal application examination procedures, mandated by their written rules, which have the effect of the law. The Defendant examined not only one--but four--of my applications for Senior Engineer 57 and I was always found qualified by the only legal authority within the City to make such a determination, the Civil Service, by the Civil Service examination process for this Civil Service protected position. Civil Service certified my qualifications for the position in writing four times on 03/24/95, 04/10/95, 03/28/96, and 02/06/98: "Your education and experience qualified you to be placed on SR ENGINEER 57 (GROWTH SERIES) register." (Pl's App. pp. 35-37) (also depositions 3R - D's App.). Thus petitioner easily meets the prima facie case requirements of McDonnell Douglas v. Green, 411 U.S. 792 (1973). The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's. Willful misrepresentation of the Defendant's qualification requirements is a disputed factual issue, where this fact and defendant's illegal motives shall be examined by the jury. It is not clear without having all the evidence presented at trial for a Judge to determine why an employer misrepresented qualification factors. The intent of the employer is a factually disputed matter precluding summary judgment. Gallagher v. Delaney, 139 F.3d 338, 342 (2nd Cir. 1998) (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1309 (2d Cir. 1995)). Employer's intent is a factually disputed matter precluding summary judgment in Title VII retaliation action.

Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. R. Civ. P. 56(c), 28 U.S.C.A.

G) An additional example of the District Courts incorrect and inconsistent justification is on page 22 (Pet. App. p. 26.) of Memorandum dated February 26, 2002. Court assumed that Benes created only a "weak" prima facie case because "he was interviewed for the position in May 1999, which may indicate his competence." Even if the Court would again incorrectly ignore the evidence of my qualifications through the Civil Service qualification process, the Court's own statement that plaintiff was highly qualified is evidenced from their acceptance of Defendant's reasoning a few lines below on page 22 (Pet. App. p. 26.) that states "and five candidates had an overall ranking of HQ, including Plaintiff. See Id. at 187 (Patterson Aff. At 2)." Therefore, the Highly Qualified (HQ) status does not create a "weak" issue of prima facie, but evidently a strong one. The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's.

An attempt to make such serious demarcations before both parties have had an opportunity to offer evidence at trial by jury is inappropriate. The dangerous overuse of summary judgment to clear trial dockets encourages employers, such as the City of Dallas who additionally has governmental immunity for managers and has vast public funds for their defense, to discriminate without restrictions and refuse to resolve cases inside the organization. This situation actually backfires with many new cases, segregates the workforce, and eliminates the original intent of Civil Rights.

H) On page 22-25 (Pet. App. pp. 25-29) of Summary Judgment Memorandum dated February 26, 2002, the court incorrectly refused to consider Plaintiff's evidence of superior qualification and superior work performance

compared to Boateng's and instead decided based on Defendant's discriminatory pretextual reasons as being facts. However, Plaintiff's Power-Point presentation (Pl's App., at 303-346) was given to Plaintiff by City Attorney herself during discovery process and each page was properly stamped by City Attorneys as Benes/Subp. - Pages 2539-2986. This presentation is properly supported by City's interview documents, City's performance evaluations and other of the City's relevant documents - Pl's App. dated 06/25/01, pages 42-11, 215-260, and 303-367 (also depositions 3R - D's App.). Here again the Court identified material factual disputes, and effectively decided merit of a case based upon their own perceptions. The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's. However, the jury, not by judge, should resolve questions of fact. If there are disputed material (pertinent) factual issues, as in this case, the case must go to trial before a jury.

I) Concerning the Pumping Manager case, the court again improperly weighted evidence and overlooked that Mr. Boateng (an outside applicant) was not the most qualified candidate, nor was ranked as "Very Highly Qualified" (VHQ) by the selection committee, as the Defendant testified. City's Selection Committee rating sheets were available to Court in Pl.'s App., pgs. 353-355. The court overlooked my evidence that Mr. Boateng's selection rating sheet, as provided by the city during discovery process, was unlawfully upgraded to VHQ and my rating was unlawfully downgraded to "Highly Qualified" (HQ), as a result of discrimination and retaliation because of my participation in legal proceedings (depositions 3R - D's App.). The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's. "The ultimate question in every employment discrimination case involving a claim

of disparate treatment is whether the plaintiff was the victim of intentional discrimination" Reeves, 530 U.S. at 153. Additionally, a genuine issue of material fact existed as to whether Mr. Benes was discriminated on the basis of racial discrimination, or whether he was discriminated because of his national origin, or whether he was discriminated because of his age, thus precluding summary judgment in favor of employer. In entertaining a motion for judgment as a matter of law, court should review all of the evidence in the record, but, in doing so, court must draw all reasonable inferences in favor of nonmoving party, and it may not make credibility determinations or weight evidence. Reeves, 530 U.S. at 150, 53 (citing Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990)). Many cases recognize that the motives of all decision-makers need not be proved to establish a discrimination case. Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1980) (where two members of five member selection committee had made biased recommendations). Petitioner demonstrated that national origin and age discrimination, not respondent's explanation was the reason for his non-promotion. The legitimate reasons offered by the defendant were not its true reason and employer's proffered explanation is unworthy of credence (Selection Committee rating sheets - Pl.'s App., pgs. 353-355, depositions 3R - D's App. and Plaintiff's evidence Pet. App. pp. 25-29, Pl's App. pages 42-11, 215-260, and 303-367). (See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 56 (1981), Reeves, 530 U.S. at 143).

J) Concerning the Program Manager 58 position (Pet. App. pp. 23-25), the court's own perception stating that Plaintiff has failed to establish a prima facie case of discrimination, specifically, that Plaintiff was not qualified for the job conflicts with my evidence in Pl's App. pages 112 - 118. As my evidence shows, "engineering experience may be obtained elsewhere," not only in Texas. This statement was certified by the City Civil Service Board in writing--the

only authority to make such a decision concerning out of Texas engineering experience. As a result of DWU discriminatory intent, the defendant unlawfully eliminated my Czech engineering experience from consideration, which effectively denied me this Civil Service protected position (See depositions 3R - D's App.). The court decided such an incorrect, pretextual piece of information provided by the City as "fact," which should be decided by a jury and not in summary judgment. Details with reference to specific evidence, also overlooked by the Court, are clearly identified in my Affidavits. The court failed to draw all reasonable inferences in favor of petitioner. Court impermissibly substituted its judgment concerning the weight of the evidence for jury's. The judge should take "a view of the evidence most favorable to the plaintiff." Wilkerson v. McCarthy, 336 U.S. 53 (1949). The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weight the evidence. Reeves, 530 U.S. at 150 (citing Lytle, 494 U.S. 545, 554-55). The language of Fed. R. Civ. P. 56(c) clearly indicates that summary judgment is inappropriate whether a genuine issue of material fact exists. The 5th Circuit has observed that the party seeking summary judgment bears the burden of proof, that "any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party," and that "a court can only enter a summary judgment if everything in the record pleadings, depositions, interrogatories, affidavits, etc. demonstrates that no genuine issue of material fact exists." Bullard v. OMI Georgia, Inc., 640 F.2d 632 (5th Cir. 1981) (citing Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980)). In deciding summary judgment (as in directed verdicts), the court is to consider "only the evidence favorable to plaintiff and the uncontradicted, unimpeached evidence unfavorable to him." Simblest v. Maynard, 427 F.2d 1 (2nd Cir. 1970). Thus the court applied contradicted evidence as fact, which is improper and a matter for the jury.

K) If Appeals Court's reviewer "carefully reviewed" my case (5th Cir. ruling October 28, 2002; Pet. App. p. 3) he would, at a minimum, realized that there is only one amended complaint and not "*various amendments* to [my] Complaint." (italics added) This first amendment only added the single and brief issue concerning the position of Manager of Pumping Operations.

An attempt to make such serious demarcations before both parties have had an opportunity to offer evidence at trial by jury is inappropriate. The dangerous overuse of summary judgment to clear trial dockets encourages employers, such as the City of Dallas (who additionally has governmental immunity for managers and has vast public funds for their defense) to discriminate without restrictions and refuse to resolve cases inside the organization. This situation actually backfires with many new cases, segregates the workforce, and eliminates the original intent of Civil Rights.

III. The District Court erred in deciding the Timeliness of Plaintiff's EEOC Complaint. Continuing violation doctrine is applicable when Defendant creates internal procedure of growth pay promotions and in particular case avoids this procedures and applies unlawful employment practices by failing to promote. These are repeating violations that continue every day by the failure to promote.

In this case, the Supreme Court will have the unique opportunity to decide a precedent dealing with specific growth pay promotions and pay slotting and preclude a thunderstorm of new cases. The lower court incorrectly decided the Timeliness of Plaintiff's EEOC Complaint on the basis of case law, Blackman v. City of Dallas, No. Civ.A.3:00-CV-0075-P, 2001 WL 18752 at *2 (N.D. Tex. Jan. 23, 2001) (citing Huckabay v. Moore, 142 F.3d at 233, 238, 240 (5th Cir. 1998)) which applied Summary Judgment to *isolated*

occurrences of regular competitive promotions to vacant positions referred to as non-promotions claims - see page 11 - 12 (Pet. App. pp. 15 and 16). However, the Defendant's unlawful employment practices, which manifest itself over time every day, (Discriminatory Growth Pay Slotting) are not isolated occurrences--every day is a failure to promote. During Growth Non-competitive Pay Slotting the employee is already in the position of Senior Engineer 57; therefore, an opening is not needed. After a Growth promotion, the employee continues to do the same job as before, but is paid in a higher pay range. The Defendant's reference to "promotion" is only a non-competitive right to be properly slotted into a higher pay range. The Civil Service rules require that "Steps should be taken to place employees in the proper classifications as quickly as possible" - 6R 822 and 830 (Book: Civil Service and How it Works / Growth Promotions, pages 12-16). The Defendant violated my rights every day by not properly slotting me in accordance with written rules, which have the effect of law. The Supreme Court has several times held that if an agency creates a procedure - a hearing right, for example - that procedure may not be avoided or dispensed even if it gives more process than is due under the Constitution. Vitarelli v. Seaton, 359 U.S. 535, 546-47 (1959).

Overwhelming evidence in my documents and affidavits show that the Defendant implemented Growth program disparately and deliberately harmed me compared to similarly situated employees. Similar to pay discrimination which manifest itself every pay period, this growth pay advancement, which manifest itself every day, satisfied the continuing violation doctrine. Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (holding "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII regardless of the fact that this pattern was begun prior to the effective date of Title VII.") As stated in Lorance v. At&T Technologies, Inc., 490 U.S. 900, 915 (1989): (holding "Under

this continuing violation theory, each time a discriminatory seniority system is applied, like each time a discriminatory salary structure is applied, an independent "unlawful employment practice" under § 703(a)(1) takes place, triggering the limitations period anew. See Bazemore v. Friday, 478 U.S. 385, 395-396, 106 S.Ct. 3000, 3006-3007, 92 L.Ed.2d 315 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII"); cf. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380, 102 S.Ct. 1114, 1125, 71 L.Ed.2d 214 (1982) ("Where the challenged violation is a continuing one, the staleness concern disappears"). Viewing each application of a discriminatory system as a new violation serves the equal opportunity goals of Title VII by ensuring that victims of discrimination are not prevented from having their day in court.")

IV. The District Court erred in granting summary judgment. This Court should realize that in addition to mandatory authority, the notions of basic fairness to prevent injustice should prevent summary judgment from being granted by a judge on this magnitude of material disputes. Since the parties were not able to resolve a single dispute during many years of continuous disputes, as evidenced for example from three day long deposition record of Frantisek Benes (D's App. 3R pp. 3-105) and from his detailed affidavits (6R 690-728, 6R 751-761), a summary judgment without a trial is wholly inadequate to get at the material disputes.

A) The Defendant's Affidavits, presented with their Motion for Summary Judgment, were made in bad faith to delay proceedings and misrepresent factual issues with the illegal intent to defeat my legal claims of discrimination and retaliation. Almost every statement in the Defendant's Affidavits is at least misleading, half true or completely false to allow subsequent misrepresentation in the City's Motion

for Summary Judgment (for a detailed explanation with reference to particular evidence; see my affidavits 6R 690-728, 6R 751-761) (also depositions 3R - D's App.). As the Supreme Court noted in Reeves, 530 U.S. at 147, (citing Wright v. West, 505 U.S. 277, 296 (1992)) it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Whether the defendant was in fact motivated by discrimination is for the finder of fact to decide. Reeves, 530 U.S. at 133 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Furthermore, "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." Reeves, 530 U.S. at 153. Defendant's Motion for summary judgment dated May 9, 2001 and Brief in Support of Defendant's Motion for Summary Judgment dated May 9, 2001 is based on Defendant's information and affidavits, which often incorrectly describes the issues. For details see my affidavits: 39 pages of disputed facts in my Affidavit 3/20/2002, 70 pages of disputed facts in my Supplemental affidavit 4/1/2002 (6R 690-728, 6R 751-761). As evidenced, the Defendant's Affidavits, presented with their motion for Summary Judgment, were made in bad faith to delay proceedings and deliberately misrepresent factual issues with the illegal intent to defeat my legal claims of discrimination and retaliation.

B) My attorney Karen Ferris Knouse has not provided me with effective assistance and representation in this case. This ineffective assistance of my counselor caused me actual prejudice, as evidenced from documents on the record. This ineffective assistance greatly increased over time, because she is seriously ill with epilepsy. As a result, she may experience memory loss, as stated by her colleague John Knouse, while petitioning the District Court for a time extension. Shortly after, she began to work exclusively from

home. It became almost impossible for me to meet with her and communicate about my case with her. Even the Magistrate Judge Jeff Kaplan repeatedly realized that she is not able to follow court orders. The Judge conducted a hearing (10/19/2000) to explore her violations of procedure. At this hearing, he recommended her to find another attorney to help her finish my case. After the hearing, she introduced me to attorney John Sherwood, who as she stated will work with her on my case. However, this never happened. During my case, Karen Knouse repeatedly missed deadlines (discovery request, amendment of complaint, Motion for Reconsideration, City's insufficient discovery response); did not properly object City's violation of discovery process; did not process various motions she promised to do for me for almost a year (include discovery deficiencies); did not give me the opportunity to properly discuss the issues involved; and ignored my written Affidavits, exhibits, and objections to City's Affidavits and Summary Judgment claims. Instead, a few hours before every deadline she would rush to put something together. For example, in response to summary judgment, she rushed her own conclusions without giving me a chance or the time to object, correct, and supplement. My objections to city affidavits were finally filed late, now in the record under Motion for Reconsideration, which was denied as untimely. These objections and exhibits were given to her on time as materials to use for Summary Judgment, which she did not use. Furthermore, after the court ruled on Summary Judgment, her office did not inform me of the ruling until more than ten days later. At that time a chance for Motion for Reconsideration had expired. She also mistakenly--without consulting with me--removed the claim of hostile environment from my case, which I had greatly covered in my complaint. In contrast, she made the hostile environment argument, which she previously waived, her second strongest point in my appeal. This is additional proof of her ineffective legal assistance. After being forced to represent

myself, which resulted in my studying the appropriate law and procedures, I realized that I was not properly represented by my attorney, mainly because of her medical conditions, which does not allow her to function properly.

C) The Supreme Court has stated that once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision, then the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Defendant were not its true reasons, but were a pretext for discrimination. Reeves, 530 U.S. at 143. However, I was not afforded this opportunity, partly due to my attorney's ineffective assistance. The Supreme Court has also found that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employee was unlawfully discriminate against. Id. at 148. In this case, almost every statement in the Defendant's Affidavits are misleading, half true, or completely false.

D) The court entered a judgment of summary judgment before I had an opportunity to conduct adequate discovery. I vigorously requested pay, promotional, and other information on comparable employees, that were necessary to adequately prove my case and respond to defendant's motion for summary judgment. This is evidenced from documents on file attached to Plaintiff's Motion to Abate Ruling on Defendant's Motion for Summary Judgment. I wanted to compare the employer's discriminatory treatment to other similarly situated employees which would create additional genuine issues of material fact as to whether similarly situated employees were not treated equally. This would affect the outcome of the suit under the governing law. The City of Dallas never fully complied with my timely discovery request. Plaintiff's Motion to abate ruling on

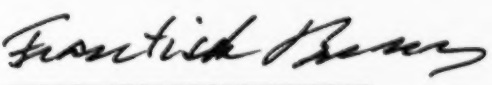
Defendant's Motion for summary judgment was denied without any explanation together with the summary judgment ruling on February 26, 2002 (Pet. App. p. 5).

The magnitude of multiple factual disputes in multiple charges over many years, as in this case, cannot be effectively settled by a decision of an Article III judge on summary judgment. A federal judge cannot determinatively say at this stage of the litigation that Benes was or was not subject to discrimination and retaliation. An attempt to make such serious demarcations before both parties have had an opportunity to offer evidence at trial by jury is inappropriate. The line between disputed factual issues and between the permissible and the impermissible in this case shall be drawn by a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: February 23, 2003

Frantisek Benes

Attorney Pro Se/Petitioner

13816 Far Hills Lane
Dallas, Texas 75240
(972) 233-8026 (214) 948-4562

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

FRANTISEK BENES, P.E.

Petitioner

vs.

CITY OF DALLAS

Respondent

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-10419
Summary Calendar

Frantisek Benes, P.E.,

Plaintiff

versus

City of Dallas, Et Al.,

Defendants,

City of Dallas,

Defendant-Appellee.

U.S. Court of Appeals
FILED
Oct. 28, 2002
Charles R. Fulbruge III
CLERK

Appeal from the United States District Court
For the Northern District of Texas

(3:99-CV-771-P)

Before BARKSDALE, DeMOSS, AND BENAVIDES, Circuit Judges. [FN1]

FN1. Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cur. R. 47.5.4.

PER CURIAM:

Frantisek Benes (hereinafter "Benes") is a 51 year old white male who was born and educated in Czechoslovakia and immigrated to the United States in 1986. He went to work for the City of Dallas in its Water Utilities Division and

over the years received regular promotions and pay raises. In April 2999, Benes sued the City of Dallas for violation of Title VII of the Civil Rights of 1964, the Age Discrimination in Employment Act of 1967, the Civil Rights Act of 1866 and 1871, and the equal protection clause of the Fourteenth Amendment actionable under 42 U.S.C. § 1983. After various amendments to his Complaint, the City moved for Summary Judgment which was granted in toto by the trial court. Benes appeals to this Court.

We have carefully reviewed the briefs, the reply brief, the record excerpts and relevant portions of the record itself. For the reasons stated by the district judge in his memorandum opinion and Order filed February 26, 2002, containing 30 pages of careful and through analysis, we affirm the Final Judgment entered by the district judge, that Benes take nothing from his claims against the City of Dallas. AFFIRM.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-10419

Frantisek Benes

Plaintiff - Appellant

v.

City of Dallas; Et Al,

Defendants,

City of Dallas,

Defendant-Appellee.

U.S. Court of Appeals
FILED
Nov. 26, 2002
Charles R. Fulbruge III
CLERK

Appeal from the United States District Court
For the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
s/ HAROLD R. DeMOSS
United States Circuit Judge

Clerks Note:
See FRAP and local Rules
41 for Stay of the Mandate.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANTISEK BENES, P.E.	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	3:99-CV-0771-P
	§	
CITY OF DALLAS,	§	
Defendant.	§	Entered Feb. 27, 2002 U.S.D.C.

MEMORANDUM OPINION AND ORDER

Now before the Court are the following:

1. Defendant's Motion for Summary Judgment, with supporting brief and appendix, filed May 9, 2001;
2. Plaintiff's Response in Opposition to Defendant City of Dallas' Motion for Summary Judgment, with supporting brief and appendix, filed June 25, 2001;
3. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, with a supplemental appendix, filed July 12, 2001; and
4. Plaintiff's Motion to Abate Ruling on Defendant's Motion for Summary Judgment Until Defendant Fully Complies with the Plaintiff's Open Records Request and to Supplement Plaintiff's Response to the Defendant's Motion for Summary Judgment, filed July 31, 2001.

After a thorough review of the summary judgment evidence, the pleadings, the parties' briefs, and the applicable law, for the reasons set forth below, the Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED. Further, the Court finds that Plaintiff's Motion to Abate Ruling on Defendant's Motion should be DENIED.

BACKGROUND

Plaintiff Frantisek Benes brings the current lawsuit before the Court against his employer, the City of Dallas, alleging claims of discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Civil Rights Act of 1866 and 1871 (as amended by the Civil Rights Act of 1991), 42 U.S.C. § 1981; 42 U.S.C. §§ 1983 and 1985; and the 1st and 14th Amendments to the United States Constitution. [FN1]

FN1. In his Response to Defendant's Motion for Summary Judgment, Plaintiff asserts that he no longer wishes to pursue and thereby waives any claims related to (1) Hostile Work Environment; (2) First Amendment Violations; and (3) Exemplary Damages. See Pl.'s Br. Opp. at 12, 15-16.

Benes is a naturalized citizen of the United States, born in Czechoslovakia on December 2, 1951. See Pl.'s First Am. Orig. Compl. at 1 (hereinafter "Compl."). Prior to his arrival in the United States, he received a Bachelor of Science degree and a Master of Science degree in Civil Engineering from the Vut University of Brno, and worked as a Registered Engineer in Czechoslovakia for ten years. See Benes Aff. at 1.

Plaintiff began his employment with the City of Dallas on or about November 18, 1987, initially hired for the position of Water Technician. See Id. at 1. He complains that the City began discriminating against him beginning sometime in January of 1989, when he applied as an inside applicant and fulfilled all city requirements (including taking a foreign degree examination) for the position of Engineer Assistant. Compl. at 3; Benes Aff. at 2. Benes claims his education was later certified by the Rochester Institute of Technology as being the equivalent of a Master of Science degree in the United States. Benes Aff. at 2-3; Pl.'s App. at 366. Nonetheless, the City instead hired several "outside applicants," with less seniority, through an "open advertisement" for these positions, allegedly in violation of its own Civil Service Rules and standards. Compl. at 3. Thus,

it is Plaintiff's belief that, beginning with his application for Engineer Assistant, the Defendant City always exposed him to full outside competition and sought every possibility for the advancement of employees of United States origin or anyone who was educated in the United States, thus treating him differently because of his Czech national origin and education. Compl. at 3-4.

Benes also alleges that despite his applications before 1991 for openings as an Engineering Drafter or Design Technician, the Defendant City also eliminated him from consideration for these positions in favor of domestic outside applicants hired through open competition, despite Plaintiff being an inside applicant with both priority and seniority rights. See Compl. at 5.

The City of Dallas finally promoted Plaintiff to an Engineer Assistant position on March 20, 1991. Id. Nevertheless, Benes complains that the City unnecessarily delayed his registration as a Texas Professional Engineer ("P.E.") because of their insistence that he first fulfill the State of Texas' requirement of two years of engineering experience in the United States, despite the fact that he had extensive engineering experience in water and wastewater and a foreign Masters Degree from Czechoslovakia. Id. Plaintiff also complains that he was discriminated against when he was given the minimum allowable salary of $2,166.00 a month, which was the salary given only to new graduates with no work experience. Id. He alleges engineers of United States origin were always given higher salaries than him, despite the fact they generally had only bachelor degrees and minimum or no experience in municipal water and wastewater management. Id. at 5-6. In addition, Benes contends that since Defendant used this discriminatory salary as the basis for determining annual, promotional and cost of living salary increases, these constituted "continuing violations," whereby each pay period amounted to a distinct illegal act, creating a pattern of pay and promotional discrimination against him. Id. at 6.

Plaintiff claims this pattern of discrimination continued through on or about October 1, 1994, when the City of Dallas restructured its engineering positions within the Dallas Water Utilities ("DWU") and the Public Works Departments ("PW"). Id. at 7. During this time, the City established alternative promotional procedures for all engineering positions, referred to as "Growth Promotions," wherein all engineer positions were reclassified to the position of Senior Engineer 57. See Id.; see also Benes Dep., Vol. II at 34. Even though their title was Engineer 57, all engineers were assigned to one of three class codes for purposes of compensation, based on his or her job duties and responsibilities: Engineer Assistant 54, Engineer 56 and Senior Engineer 57. See App. Def. Mot. at 179 (Palmer Aff. at 1). Benes, who was an Engineer Assistant prior to the redesign, was assigned class code 54, though his title was changed to Engineer 57. See Id. at 180 (Palmer Aff. at 2).

Later, after receiving his professional engineer certification from the State of Texas on or about February 3, 1995, see Benes Dep., Vol. 1 at 58, Benes asserts that he was certified as eligible for final Engineer 57 pay level by the Civil Service as early as March 1995, and again in April 1995 and March 1996. See Compl. at 8. Benes claims the City of Dallas violated the Civil Service Rules, which require that steps be taken to place employees in proper classifications as quickly as possible, by not promoting him to final 57 pay level during this time, even though 17 other DWU and PW engineers (including Hamid Fard, who had foreign work experience, but was not of Czech origin) were promoted by the City. See Id.; see also Benes Aff. at 6. As such, Benes believes that from March 15, 1995 until March 25, 1998, when he was finally promoted to Senior Engineer 57, he was discriminated against by the City's Engineer Growth Series Pay Slotting and Pay Promotions program. See Compl. at 9-10; see also Benes Dep., Vol. II at 6.

Meanwhile, on March 15, 1995, Benes received a promotion to Engineer 56 class, together with an 8 percent

pay raise, following the implementation of the growth series. See Benes Dep., Vol. I at 59, 64-67. However, Benes believes even this promotion was done discriminatorily since it was not postponed in order for him to receive an additional four-percent merit increase he believed was due to him from his previous Engineer 54 status. See Id. at 70-71. Thus, on November 15, 1995, he submitted a grievance to his supervisor relative to this complaint. See Id. at 66-67.

Plaintiff also alleges other incidents of illegal discrimination and unfair employment practices by the DWU management during this time. More specifically, on or about March 16, 1995, Benes alleges he had a meeting with the Division Manager Daniel Saldana, wherein Plaintiff asserted unfairness and differences in pay compared to other similarly situated employees. See Compl. at 17. Plaintiff states that Mr. Saldana told him that his pay was proper because Plaintiff spoke English with an accent, which the assistant director thought was difficult to understand. See Id. at 18. Also, on March 21, 1995, Mr. Saldana, in the presence of Saeed Rezai, purportedly signed and returned to Plaintiff the documentation package he had submitted to support his request for proper pay. See Id. In addition, Benes claims he was segregated into an undesirable work unit in the Relocations Department from March 1995 through January 1997, though he had applied repeatedly for position pay level 57. See Id. He also believes he was wrongfully denied cross training with preferable group project management. See Id. Moreover, Benes alleges he was exposed to harassment and retaliation from his Manager, Jim Milstead, during the interview process in March 1996 and after filing discriminatory grievances, when Milstead purportedly tried to damage Plaintiff's performance evaluations by attempting to find mistakes in Plaintiff's work, and trying to exclude him from assignments which would give him more experience in Texas. See Id. All this, Benes believes, amounts to further evidence of national origin discrimination by the Defendant.

In addition, during March of 1996, Benes alleges that DWU discriminated against him during the interview process for the position of Senior Engineer 57. See Compl. at 32. More specifically, Plaintiff asserts Mr. Milstead illegally promised to hire Brian Cowan, who was of United States origin, even though Mr. Cowan had resigned from DWU employment and therefore had lost his seniority and other credits. See Id. Plaintiff believes Milstead discriminated against him by omitting his Engineer Growth Series rights to noncompetitive promotion for the position, and because he was already working in Relocations (i.e., an inside applicant), had seniority credit, and had a detailed knowledge of the projects and the working environment. See Id. Thus, Benes declares this "opening" of the Engineer 57 position in Relocations to the entire public, instead of simply implementing a competitive "Promotional" announcement (open to City employees only), was discriminatory toward him. See Benes Aff. at 7-8. Thus, by violating City rules in using open competitive outside advertisements, outside applicant Cowan was able to be hired in Plaintiff's stead. See Compl. at 33. Benes believes Milstead deliberately gave less importance to his specific qualifications (such as seniority, records of merit, education outside Texas, and specific water and sewer experience) and focused more on arbitrary, nonessential experiences for the job (such as computer and CASS experience, budget experience, verbal skills and Texas experience) in order to discriminate against him. See Id. at 35- 40.

Again, sometime in September 1997, Benes alleges that Dallas Water Utilities management simulated an interview process to cover up the discriminatory interview process of March 1, 1996. See Compl. at 41. This is how, according to Plaintiff, DWU selected inside applicant Hamid Baha, one of a few foreign nationality engineers who had not yet been promoted, even though he was not qualified as an electrical engineer and had less than one year experience in the civil engineering field. See Id. Plaintiff believes that

DWU and Milstead specifically continued to be "strict" with him, denying him this promotion based on his Czech national origin. See Id.

Benes further charges that the City continued its discriminatory treatment of him on or about December 1998, during the City's selection of the next promotional step: Engineer 58 (Program Manager). See Id. at 10. More specifically, Plaintiff claims that Defendant's discrimination consisted of amending, unnecessarily, the minimum requirements for the Engineer 58 position to five years of recent experience as a Texas Registered Professional Engineer. See Benes Aff. at 7; see also Compl. at 11. He believes this decision by the City effectively screened him out of the opportunity to even apply for the Engineer 58 position, and was done specifically to eliminate him from consideration because of his Czech national origin. See Compl. at 8-9, 11. Consequently, Betty Taylor and Robert Johnson, both younger than Plaintiff, and Charles Stringer, all of whom were of United States national origin, were promoted to Engineer 58 instead. See Id. at 11.

On October 1, 1998, Plaintiff filed a charge of discrimination with the EEOC, alleging he was denied equal wages as a Senior Engineer 57 before March 24, 1998, and was denied promotion to pay level Engineer 57, due to his Czechoslovakian national origin. See App. Def.'s Mot. at 141; see also Benes Dep., Vol. II. at 61-62. Benes received his right to sue letter as to these charges sometime after January 7, 1999. See Benes Dep., Vol. II at 62.

On February 26, 1999, Plaintiff again filed charges of discrimination and was issued a right to sue letter the same day by the EEOC, related to allegations of national origin, retaliation and age discrimination, covering the time period between January 20, 1989 and February 26, 1999. See App. Def.'s Mot. at 143-146; Benes Dep., Vol. II at 112-113. Plaintiff's second charge covered allegations that since 1989 he was not hired for the position of Engineer Assistant 54 and was denied equal wages. See Benes Dep., Vol. II at 115-

116. Plaintiff's charge also stated he was denied promotions to Engineer 54, 56, 57 and 58 status during these years when much younger people were hired, with less experience and less education than him. See Id. at 117-118. Additionally, Benes also included charges of retaliation in his complaint, based on his suspicions that these non-promotions had something to do with the filing of grievances with the City. See 127-128.

Finally, in May of 1999, Benes interviewed for the position of Pumping Manager 58. App. Def.'s Mot. at 186 (Patterson Aff. at 1). The selection committee, however, instead selected Alfred Boateng, whom the committee had scored higher than Plaintiff. Id. at 187 (Patterson Aff. at 2). Benes alleges that the City illegally upgraded Mr. Boateng's interview scores to be able to select him for the position and downgraded his interview scores to damage his chances of being selected. See Id. at 122-127 (Pl.'s Resp. Interrog. No. 2). After being informed on June 25, 1999 that he was not chosen for the promotion, Plaintiff filed another charge of discrimination with the EEOC on April 17, 2000. See Benes Dep., Vol. III at 96; see also App. Def.'s Mot. at 147. In this charge, Benes complained that he was discriminated against because of his race (White), national origin (Czech), age (47), and in retaliation for having filed his previous charges of discrimination. See App. Def.'s Mot. at 147. He received a right to sue letter for this charge of discrimination on or about July 15, 2000. See Benes Dep., Vol. III at 96.

Thereafter, Benes filed his Original Complaint against the City of Dallas on April 7, 1999, and his First Amended Original Complaint on October 19, 2000, now pending before this Court.

DISCUSSION

I. The Parties Claims

In this action, in his remaining claims Benes asserts a right of recovery against Defendant City of Dallas for intentional discrimination and retaliation taken against him

in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Civil Rights Act of 1866 and 1871, 42 U.S.C. § 1981; 42 U.S.C. §§ 1983 and 1985; and the 14th Amendment to the United States Constitution. See Pl.'s Orig. Comp. at 1-4; see also Footnote 1 supra. More specifically, Plaintiff contends that: (1) he was treated disparately because of his national origin and race compared to other similarly situated co-workers of the Defendant; (2) suffered retaliation by wrongfully being denied promotion opportunities when he complained about this disparate treatment; (3) was discriminated against because of his age compared to other similarly situated co-workers; and (4) suffered discrimination encroaching on his constitutional rights, including his rights to equal protection under the 14th Amendment. See Pl.'s Compl. at 44, 48, 50-51, 53.

Meanwhile, Defendant City of Dallas moves this Court for relief claiming that summary judgment is proper because (1) most of Plaintiff's claims are time- barred; (2) Plaintiff cannot establish a prima facie case on several of his claims; (3) Plaintiff cannot adduce evidence to permit a reasonable trier of fact to find the articulated reasons for the City's actions were pretextual, or to find that "but for" his protected activity the City would not have taken the actions in question; and (4) he cannot establish a § 1983 violation because he cannot show the existence of an unconstitutional policy or custom, or establish the existence of an injury as a result thereof. See Def.'s Mot. Summ. J. at 7. Each of these arguments will be considered in turn.

II. Standard for Summary Judgment

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). All

evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. Celotex, 477 U.S. at 323. Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless he provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. Id. at 248-50; Abbot v. Equity Group, Inc., 2 F.3d 613, 619 (5th Cir.1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1429 (5th Cir.1996) (en banc). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. Celotex, 477 U.S. at 322-23. The Court will not, in the absence of any proof, assume that the nonmoving party could or would prove the essential facts necessary to support a judgment in favor of the nonmovant. See Little v. Liquid Air Corp., 37 F.3d 1069, 1075-1076 (5th Cir.1994).

Finally, the Court has no duty to search the record for triable issues. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998). "The party opposing summary

judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his or her claim." Id. A party may not rely upon "unsubstantiated assertions" as competent summary judgment evidence. Id.

III. Non-Promotion Claims

A. Timeliness of Plaintiff's EEOC Charges

In Texas, a plaintiff bringing claims under either Title VII or the ADEA must file a charge of discrimination with the EEOC within 300 days after learning of the conduct alleged. See 42 U.S.C. § 2000e-5(e)(1) (2001); 29 U.S.C. § 626(d)(2) (2001); see also Huckabay v. Moore, 142 F.3d 233, 238 (5th Cir.1998). Federal courts generally treat this 300-day filing requirement as in the nature of a statute of limitations. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-394 (1982); see also Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 537 (5th Cir.1998). However, under the "continuing violation" doctrine, a limited, equitable exception to the limitations period exists when the unlawful employment practice manifests itself over time, rather than as a series of discrete acts. See Huckabay, 142 F.3d at 238. The focus in applying the continuing violation theory is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. See Id.

In this case, Benes did not file charges of discrimination with the EEOC until October 1, 1998 (for the denial of equal wages and promotion to Senior Engineer 57 level from 12/05/97 to 03/24/98 because of national origin) and February 26, 1999 (for violations occurring between 1/20/89 and 2/26/99 based on national origin, age and retaliation). See App. Def.'s Mot at 141-146. [FN2] Nonetheless, Plaintiff contends that since Defendant City used a discriminatory salary as the basis for determining annual, promotional and cost of living salary increases, each

pay period amounted to an illegal act in a pattern of pay and promotional discrimination against him, constituting "continuing violations." See Compl. at 6.

FN2. Benes filed a third charge of discrimination with the EEOC on April 17, 2000 for the denial of promotion to Manager of Pumping Operations 58 on June 25, 1999. See App. Def.'s Mot at 147-148. The Court shall address this charge of discrimination below.

In the past this Court has found that whenever "failure to promote claims" are involved, a plaintiff cannot rely on the continuing violation doctrine to extend the limitations period because such claims, by their very nature, are isolated occurrences that should have put the plaintiff on notice that a claim had accrued. See Blackman v. City of Dallas, No. Civ.A.3:00-CV-0075-P, 2001 WL 18752 at *2 (N.D.Tex. Jan. 23, 2001) (Solis, J.) (citing Huckabay, 142 F.3d at 240). Plaintiff himself acknowledges here being on notice of potential discriminatory actions when he claims he was exposed to full outside competition and treated differently because of his Czech origin and education when Defendant City failed to promote him to (1) Engineer Assistant, from January 1989 to March 1991; (2) Engineering Drafter and/or Design Technician prior to 1991; and (3) Senior Engineer 57 in March 1995, April 1995 or March 1996. See Pl.'s Compl. at 1-6. Indeed, Benes wrote numerous letters and instituted several grievances throughout this period complaining to City of Dallas officials of what he believed were discriminatory denials of each of these promotions. See App. Def.'s Mot. at 163-178). As such, "plaintiff may not [now] employ the continuing violation theory to resurrect claims about discrimination concluded in the past, even though its effects persist." Berry v. Board of Sup'rs of L.S.U., 715 F.2d 971, 979 (5th Cir.1983). Therefore, as a general matter, any potential claims arising out of Defendant's alleged discriminatorily motivated non-promotions, shall be considered time barred if they occurred prior to December 5, 1997, and May 4, 1998 (300 days before the filing of Benes'

first two EEOC charges on October 1, 1998 and February 26, 1999, respectively).

B. Timeliness of Plaintiff's Judicial Complaint

Defendant City further asserts that Plaintiff's claim for non-promotion to Pumping Manager 58 in June of 1999 is also time barred since this claim was not included until his First Amended Complaint, which was not filed within 90 days after Plaintiff received his right to sue letter from the EEOC. See Def.'s Mot. Summ. J. at 4.

Under Title VII and the ADEA, the time to file a complaint ends on the 90th day after the EEOC has issued its right to sue notice. See 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(e); see also St. Louis v. Texas Worker's Comp. Comm'n, 65 F.3d 43, 47 (5th Cir.1995). This 90-day limitation period begins to run on the date that the EEOC right to sue letter is delivered to the offices of formally designated counsel or to the claimant himself. See Ringgold v. Nat'l Maint. Corp., 796 F.2d 769, 770 (5th Cir.1986). In this case, Benes acknowledges receiving his right to sue letter related to the April 17, 2000 EEOC charge on or about July 15, 2000. See Benes Dep., Vol. III at 96. He subsequently filed an unopposed motion for leave to amend his Original Complaint on October 11, 2000. Thereafter, United States Magistrate Judge Jeff Kaplan unfiled Plaintiff's motion, citing his failure to comply with the Court's Standing Order on Non-Dispositive Motions and Local Rule 7.1(c), requiring that proposed orders be signed by all counsel of record. See Show Cause Order dated 10/12/00. Benes was later granted leave by Judge Kaplan to file his First Amended Complaint on October 19, 2000, which included the additional charge of discrimination.

Although Plaintiff's amended complaint was filed 103 days after the receipt of his right to sue letter, but for the defectiveness of Benes' first motion for leave, the non-promotion claim to Pumping Manager 58 would have been considered timely within the prescribed 90-day period. The Fifth Circuit has stated that, though sparingly used,

equitable tolling may apply where the claimant has actively pursued a judicial remedy but has filed a defective complaint. Rowe v. Sullivan, 967 F.2d 186, 192 (5th Cir.1992). The Court finds that equitable tolling is appropriate here, since Plaintiff, without a doubt, was vigorously pursuing his action but inadvertently missed the Court's deadlines because of his counsel's defective first motion for leave to amend. As such, the Court denies summary judgment to Defendant on this claim.

C. The Parties' Burdens Under the Failure to Promote Claims

At the outset, it should be noted that district courts are free to adopt the same basis for deciding both Section 1981 and Title VII failure to promote claims because both types of claims are analyzed under the general Title VII evidentiary framework. See Walker v. Thompson, 214 F.3d 615, 625 (5th Cir.2000). In addition, claims brought under the ADEA are also subject to this same analytical framework. See O'Conner v. Consol, Coin Caterers Corp., 517 U.S. 308, 311 (1996); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 n. 4 (5th Cir.1993).

When a plaintiff such as Benes alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 141 (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). That is, the plaintiff's age, race, and/or national origin, must have "actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome." Id. Thus, plaintiff must prove intentional discrimination either through direct evidence or indirect evidence. See Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir.1997).

Direct evidence of discrimination is evidence that proves the defendant acted with discriminatory intent, without the need for inference or presumption. Mooney v.

Aramco Serv. Co., 54 F.3d 1207, 1217 (5th Cir.1995). If direct evidence is unavailable, as is typically the case, the plaintiff may create an inference of discrimination by using the familiar McDonnell Douglas/St. Mary's burden shifting framework. See Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir.2000).

In order to create an inference of discrimination, the plaintiff must first establish a prima facie case of discrimination. Shackleford v. Deloitte & Touche, LLP, 190 F.3d 398, 404 (5th Cir.1999). Such a prima facie case is established if the plaintiff provides evidence that: (i) he is a member of a protected class; (ii) that he sought and was qualified for an available employment position; (iii) that he was rejected for that position; and (iv) that after he was rejected, the employer promoted, hired, or continued to seek applicants with the plaintiff's qualifications. See Grimes v. Texas Dep't of Health and Mental Retardation, 102 F.3d 137, 140 (5th Cir.1996); see also Jones v. Flagship Int'l, 793 F.2d 714, 724 (5th Cir.1986) (alleging sex discrimination in employer's failure to hire or promote). In an age discrimination claim, the plaintiff may alternatively satisfy the fourth element by showing that "he was either (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discriminated because of his age." See Brown v. Bungee Corp., 207 F.3d 776, 781 (5th Cir.2000); see also Meinecke v. H & R Block, 66 F.3d 77, 83 (5th Cir.1995).

The prima facie case, once established, raises a presumption of discrimination which the defendant must rebut by articulating legitimate, nondiscriminatory reasons for its actions. Shackleford, 190 F.3d at 404. This burden on the employer is only one of production, not persuasion, involving no credibility assessments. Russell, 235 F.3d at 222. If the employer carries its burden, the mandatory inference of discrimination established by the prima facie case drops out of the picture. Id.

Since the ultimate burden of persuasion remains at all times with the plaintiff, the Supreme Court has stated that in attempting to satisfy this burden, the plaintiff-once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision-must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but was a pretext for discrimination. Reeves, 530 U.S. at 143. Consequently, the Supreme Court has found that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employee was unlawfully discriminated against. Id. at 148. However, this is not to say that a showing of pretext alone automatically would entitle an employee to a judgment as a matter of law. Id. That is, there may be instances where the employer would be entitled to judgment if the record conclusively revealed some other nondiscriminatory reason for its decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reasons were untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. Id. Regardless, at this summary judgment stage, Plaintiff need only raise a genuine issue of material fact. See Khanna v. Park Place Motorcars of Houston, Ltd., NO. CIV.A. 3:99-CV-0135, 2000 WL 1801850 *2 (N.D.Tex. Dec. 06, 2000) (Fitzwater, J.).

D. Application of the Law to the Facts

In the instant case, Benes essentially claims that he was discriminated against by being denied the following promotions: (1) to Engineer Assistant, from January 1989 to March 1991; (2) to Engineering Drafter and/or Design Technician, pre-1991; (3) to Senior Engineer 57, from March 1995 to March 1998; (4) Program Manager Engineer 58 in December 1998; and (5) Pumping Manager Engineer 58 in

June 1999. See Pl.'s Compl. at 1-6. Each of these claims will be addressed in turn.

1. Engineer Assistant, Engineering Drafter and/or Design Technician Positions.

As more fully stated above, since Benes did not timely file an EEOC discrimination charge regarding any alleged discrimination in the denial of promotions to Engineer Assistant, Engineering Drafter and/or Design Technician between January 1989 to March 1991, these potential claims, having occurred prior to December 5, 1997 or May 4, 1998, are considered time barred by the Court. See Section III(B) supra. Accordingly, summary judgment is granted to the Defendant with respect these claims.

2. Senior Engineer 57 Position.

Plaintiff asserts that because of his Czechoslovakian national origin, he was denied equal wages and a promotion to pay level Senior Engineer 57 status from December 5, 1997 until March 25, 1998, in violation of Title VII. See App. Def.'s Mot at 141-142 (EEOC Charge dated 10/1/98). Additionally, Benes claims he was discriminated against for this position when, in March 1995, he was assigned to class code Engineer 56 status while 17 other DWU and PW engineers, not of Czech origin, were promoted to Engineer 57 status by the City. See Compl. at 8. And again discriminated against in March of 1996, when he was not selected for a vacant Senior Engineer 57 position later filled by Brian Cowan, an engineer of United States origin. See Id at 32. In addition, Benes alludes to discrimination against him in September 1997, when DWU management simulated an interview process to cover up their previous discriminatory interviews of March 1996, and selected inside applicant Hamid Baha, an engineer of foreign nationality (though not a Czech), who was less qualified for the position. See Id. at 41. However, having already found Plaintiff's Title VII-based claims which occurred prior to December 5, 1997 are considered to be time

barred, the Court shall limit its analysis only to Benes' non-promotion to Senior Engineer 57 status from this date until March 25, 1998.

To articulate a prima facie case of discrimination, Plaintiff must show that he (i) belongs to a protected class; (ii) sought and was qualified for the job; (iii) was rejected for that position; and (iv) was replaced by someone outside the protected class. See Blackman, 2001 WL 18752 at *2. In this case, Defendant City of Dallas does not challenge Benes' status as a member of a protected class. However, it does challenge Plaintiff's ability to establish a prima facie case in that he was not qualified for the job. More specifically, Defendant asserts that the Water Department's growth series, implemented on March 1, 1995, required a minimum of 4 years of progressive engineering experience following P.E. registration in Texas before an employee became eligible for promotion from Engineer 56 to Senior Engineer 57 status, a standard which Benes did not satisfy. See Br. Supp. Def.'s Mot. at 12; see also App. Def.'s Mot. at 151-152.

Plaintiff admits that he did not receive his professional engineer's certification from the State of Texas until on or about February 3, 1995. See Benes Dep., Vol. 1 at 58. Nevertheless, Plaintiff claims that he should have been qualified and eligible for promotion to Senior Engineer 57 because the City's 4-years experience requirement lacked any legitimate rationale. See Pl.'s Br. Opp. at 8. Plaintiff's reasoning is based on the fact that the Texas Board of Professional Engineers, which is the state licensing board for engineers, only required him to obtain an additional two years of engineering experience in the United States before becoming eligible for registration in Texas. See Id. Thus, Benes asks rhetorically, "what is so special about the City of Dallas Water Department that overrides the licensing board for Texas requirements for registration to not only double the engineering requirement to four years but to [also] make it 'progressive'?" Id. at 13. However, regardless of the wisdom of this requirement, Plaintiff does not challenge the

City's evidence that these criteria were applied objectively and evenhandedly to all employees. See Def.'s Reply at 10. Moreover, Benes has not presented any evidence that suggests he was treated differently than a similarly situated individual. See Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir.1991).

Furthermore, Defendant has provided the Court with evidence that demonstrates that once Benes met the years experience requirement in March of 1998, [FN3] and he was in a position that allowed for growth to a Senior Engineer 57, he was subsequently promoted to that class code. Therefore, Plaintiff has failed to carry his burden of establishing a prima facie case of discrimination for non-promotion to the Senior Engineer 57 position between December 1997 and March 1998. Accordingly, summary judgment shall be granted to the Defendant with respect this claims.

FN3. In 1997, the growth series was amended to require only three years progressive registered engineering experience for promotion from Engineer 56 to Engineer 57 status. See App. Def.'s Mot. at 157.

3. Program Manager Engineer 58 Position

Benes further alleges that the City of Dallas discriminated against him on the basis of his national origin and age, on or about December of 1998, when he was not offered promotion to Program Manager 58. See Compl. at 10. More specifically, Plaintiff claims that he was not allowed to interview for three vacant Program Manager 58 positions which became available in December 1998, even though he asserts he applied for the position and was certified by the Civil Service. See Benes Dep., Vol. III at 6. Instead, these positions were given to three employees of United States national origin, Charles Stringer, Betty Taylor and Robert Johnson, the latter two being younger than Plaintiff. See Compl. at 11. Meanwhile, Defendant again claims that Benes cannot establish a prima facie case of discrimination because he was not qualified for the position. See Br. Supp. Def.'s Mot. at 16.

According to Terrance W. Stewart, Director for DWU, the Program Manager 58 positions were not part of the growth series for the City's engineers and thus were filled through a competitive interview process. See App. Def.'s Mot. at 202 (Stewart Aff. at 4). As such, when the three positions became available in December 1998, the designated selection committee conducted interviews of only those eligible candidates who were on that particular Civil Service register. See Id. at 184 (Dugger Aff. at 1-2). In addition, the minimum requirements for these positions, which were established by the hiring department, included a minimum five years of registered engineering experience. See Id. The record evidence in this case shows that the Plaintiff was not on the Program Manager 58 register, and also lacked the required five years registered experience since, at the time, Benes had only been registered as a P.E. in Texas for approximately three and one-half years. See Id. at 197-198 (Turner Aff. at 1-2); see also Br. Supp. Def.'s Mot. at 16.

Nevertheless, Benes asserts that Defendant discriminated against him by unnecessarily amending the minimum requirements to include these 5 years of recent experience as a Texas registered P.E. for the position, and for not including his experience as an engineer in Czechoslovakia, thus rendering him ineligible to interview for three vacant Program Manager 58 positions. See Compl. at 11; see also Benes Aff. at 7. Again, regardless of the wisdom of this decision, the Plaintiff cannot point the Court to any evidence that this requirement was patently discriminatory on its face, or that it was not applied objectively and evenhandedly to all City and non-City applicants for these position. Moreover, Benes has not presented any evidence that suggests he was treated differently than any other similarly situated individuals that did receive interviews even though they lacked the requisite years' experience or were not on the register. See Little, 924 F.2d at 97.

Further, Benes' claim that he was discriminated against because of his age also fails here. His allegation is simply based on the fact that two of the three applicants hired by the City for the Program Manager 58 positions were younger than he. However, an essential element in establishing a prima facie case of age discrimination requires that the plaintiff prove his qualifications for the position in question. See Brown, 207 F.3d at 781. Therefore, based on the above stated considerations, the Court finds that Benes has failed to carry his burden of establishing a prima facie case of discrimination for non- promotion to the Program Manager Engineer 58 on or about December 1998. Accordingly, summary judgment is granted to the Defendant with respect this claim.

4. Pumping Manager Engineer 58 Position.

Benes also claims he was discriminated against because of his national origin, race and age when he was not promoted to Pumping Manger 58 on or about June 25, 1999. See Compl. at 53. [FN4] Specifically, Plaintiff asserts that Defendant instead hired Alfred Boateng, an African-American individual of United States origin, who was almost ten years younger than he, and who had less experience and less education than Plaintiff. See Pl.'s Br. Opp. at 11.

FN4. Plaintiff's allegations of discrimination in his non-promotion to Pumping Manager 58 also include charges of retaliation against Defendant City which will be addressed below.

Benes may establish a prima facie case here if, in addition to (i) being a member of a protected class and (ii) that he sought and was qualified for the Pumping Manager 58 position, he proves (iii) he was rejected for that position and (iv) that after he was rejected, the employer promoted, hired, or continued to seek applicants with the plaintiff's qualifications or outside of plaintiff's protected class. See Grimes, 102 F.3d at 140; see also Jones, 793 F.2d at 724. Here,

the Court finds that, though weak, Benes can make out a prima facie case of discrimination: he was within the relevant protected classes for national origin (Czech), race (White) and age (48); he was interviewed for the position in May 1999, which may indicate his competence; he was not promoted; and the position was filled by someone not within any of his relevant protected classes. See Okere v. Bill J. Priest Inst. for Econ. Dev., No. 3:00-CV-2660-H, 2001 WL 1297654 at *4 (N.D.Tex. Oct. 10, 2001) (Sanders, S.J.).

The burden then shifts to the Defendant to provide legitimate, nondiscriminatory reasons for its actions. See Shackleford, 190 F.3d at 404. Here, the City of Dallas asserts that the selection committee, on May 27 and 28, 1999, interviewed ten candidates, including Frantisek Benes, for the Pumping Manager 58 position. See App. Def.'s Mot. at 186 (Patterson Aff. at 1). The committee scored each candidate in several categories, with all candidates being rated as qualified ("Q"), highly qualified ("HQ"), and very highly qualified ("VHQ"). See Id. at 186-187 (Patterson Aff. at 1-2). Four candidates had an overall ranking of VHQ, among these Mr. Boateng, and five candidates had an overall ranking of HQ, including Plaintiff. See Id. at 187 (Patterson Aff. at 2). Based on the rankings of the selection committee, Mr. Larry Patterson, who was the Assistant Director for DWU, conducted a second round of interviews with three of the four VHQ candidates, including of Mr. Boateng, who was ultimately selected as the most qualified candidate. See Id. According to Mr. Patterson, no candidate was given points during their evaluation because of seniority, and national origin, gender, race and age did not factor in Plaintiff's or any other candidate's evaluation. See Id.

Thus, having proffered a legitimate, nondiscriminatory reason for Benes' non-promotion to the Pumping Manager 58 position, any inference of discrimination established by his prima facie case drops out of the picture, and the burden swifts back to him to demonstrate that Defendant's reasons are in fact pretextual.

See Evans v. City of Houston, 246 F.3d 344, 350 (5th Cir.2001). Here, Plaintiff does not really dispute the qualifications of Boateng, but offers instead that he was the best and most highly qualified candidate for the position. See Pl.'s Br. Opp. at 11. Plaintiff provides the Court with more than 40 pages of a Power-Point presentation purportedly given to Terrace Stewart, Director for DWU, comparing his qualifications and his experience to those of Mr. Boateng. See Pl.'s App., Exh. 23 at 303-346. Among this evidence, Plaintiff's presentation claims that he had more than 22 years of experience in Municipal water and wastewater pipelines, structures and dams (to Boateng's approximately 5 years in water or wastewater), and he had the equivalent of a Masters Degree (while Boating had a B.A.). See Id. However, none of these exhibits on which Plaintiff relieves have been properly authenticated by him. Federal Rule of Evidence 901 requires that as a condition to admissibility, evidence must be authenticated or identified. [FN5] The evidence presented to the Court is also in violation of the hearsay rule since this evidence consists of unverified written statements presented for their truth, but without even the slightest indicia of reliability. See Fed.R.Evid. 801-802. Regardless, even if the Court were to consider Plaintiff's evidence, Benes' attempts to show pretext and intentional discrimination by claiming that he had more experience and a better education than Boateng plainly fails. Defendant acknowledges that Benes had more seniority with the City, however, seniority did not play any role in the selection process for this Program Manager 58 position, and education and experience were only one of the categories considered during the selection process. See App. Def.'s Mot. at 187 (Patterson Aff. at 2). A genuine issue of material fact is created when the evidence shows that the plaintiff was "clearly better qualified" than the employee who was selected. See Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 42 (5th Cir.1996). Moreover, the evidence must be more than mere subjective beliefs or speculation by the Plaintiff. See Id.

FN5. The only attempt to authenticate the evidence is Plaintiff's statement in his affidavit that: "During my employment with the City of Dallas I have received copies of documents, requested copies of documents and received copies of documents from the City of Dallas. I am familiar with the documents that I have received throughout my employment as described and the documents that I have received as a result of my lawsuit and request to the City of Dallas ... My personal knowledge of the events described in this Affidavit also consists of my continued interaction with the engineers, engineer assistants, and other City employees, by visiting their offices, speaking with them, viewing their personnel files, viewing degrees on walls of offices, celebrating birthdays, discussing salary and promotions with co-workers, through casual and serious conversation." See Benes Aff. at 1-2.

Here, similar to the plaintiff in Nichols, Benes suggests that he was better qualified than the selected individual simply because he had more work experience than him. See Id. But even so, "an attempt to equate years served with superior qualifications is unpersuasive," and more evidence, such as comparative work performance, is needed to raise a genuine fact issue. See Id. (citing Bodenheimer, 5 F.3d at 959); see also Huckaby v. Crown, Cork & Seal, No. Civ.A. 3:98-CV-1237-P, 1999 WL 680228 at *4 (N.D.Tex. Aug. 31, 1999) (Solis, J.) (mere fact that a plaintiff believes his employer discriminated against him is insufficient to prove discrimination). Because the evidence shows that the City of Dallas had a legitimate, non-discriminatory reason for selecting Mr. Boating instead of Plaintiff, namely the selection committee's belief that he was the more qualified of the candidates interviewed, and since Plaintiff has not produced any evidence other than this subjective belief regarding his superior qualifications, he has failed to make the requisite showing of pretext for a finding of discrimination. See Musgrove v. Mobil Bus. Res. Corp., No. 3:97-CV-2795-P, 1999 WL 108931 at *4- 5 (N.D.Tex. Nov. 29, 1999) (Solis, J.). The Court declines to substitute its judgment for that of an employer in evaluating what types

of experiences are most valuable for an employee in the new position in the absence of proof that the standards were not consistently applied or were so irrational or idiosyncratic so as to suggest a cover-up. EEOC v. Louisiana Office of Cmty. Serv., 47 F.3d 1438, 1445-1446 (5th Cir.1995).

Moreover, Benes has also alleged that the City may have illegally upgraded Mr. Boateng's interview scores in order to have selected him for the position of Program Manager 58 and may have downgraded Plaintiff's interview scores to damage his chances of being selected. See App. Def.'s Mot. at 122- 127 (Pl.'s Resp. Interrog. No. 2). However, Plaintiff has again presented the Court with nothing more than his own subjective belief in order to substantiate these accusations of wrongdoing.

Further, the summary judgment evidence shows two other candidates besides Mr. Boating who had an overall score that was higher that Plaintiff's and were given a second interview by the selection committee, and would have presumably been promoted before the Plaintiff if Mr. Boateng had not been chosen. See Def.'s Reply at 12. Therefore, since Benes has failed to create a jury issue that Defendant's proffered reasons for his non-promotion were a pretext for discrimination, summary judgment shall be granted against Plaintiff on these claims. See Crawford, 234 F.3d at 903 (plaintiff must present sufficient evidence to find that the employer's asserted justification is false).

IV. Retaliation Claims

Benes also brings claims of retaliation taken against him Defendant City while engaging in protected activities, namely when he complained about disparate treatment as he was denied promotion opportunities throughout his employment. See Compl. at 48. The Court notes that the elements of a 42 U.S.C. § 1981 claim for retaliation are identical to the elements of an ADEA and a Title VII claim, see Anderson v. Douglas & Lomanson Co., Inc., 26 F.3d 1277, 1284 n. 7 (5th Cir.1994), and therefore it shall examine

these claims under the McDonnell Douglas burden-shifting analysis for claims of unlawful retaliation. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir.2000).

Under this framework, if Benes can establish a prima facie case, he will have raised a rebuttable presumption of discrimination and shifted the burden to Defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. See Id. If Defendant satisfies this burden of production, the burden returns to Benes to show that Defendant's proffered reason is a mere pretext for unlawful retaliation. See Id. The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a "but for" cause of the adverse employment decision. Long v. Eastfield College, 88 F.3d 300, 304 n. 4 (5th Cir.1992) (citing McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir.1985)).

To make out a prima facie case for retaliation, Plaintiff must prove that (i) he was engaged in protected Title VII activity; (ii) he suffered an adverse employment decision; and (iii) a causal nexus exists between the protected activity and the adverse employment decision. Byers, 209 F.3d at 427. An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. See 42 U.S.C. § 2000e3(a) (2001).

Throughout his complaint and deposition, Benes has asserted that the City of Dallas retaliated against him for submitting several grievances, including one on November 15, 1995. See Benes Dep., Vol. I at 66-67. Plaintiff alleges this retaliation manifested itself through (a) non-promotions to Senior Engineer 57 in March of 1996, to Program Manager 58 in December 1998, or to Pumping Manger 58 in June of 1999; (b) by subjecting him to more supervision; (c) by considering only his Texas experience during the promotional process; (d) in giving him undesirable work assignments; (e) by

failing to consider his seniority during the promotional process; (f) by denying him cross-training opportunities; (g) subjecting him to an unfair grievance process; and (h) using open advertisements in the hiring procedures. See Benes Dep., Vol. III. at 8-9, 61-63, 71-72, 75, 79-80, 82-84. [FN6] However, in his Response to Defendant's Motion for Summary Judgment, Benes for the first time alleged that the protected activities on which he was relying on for his retaliation claims included the three charges of discrimination filed with the EEOC on 10-1-98, 2- 26-99, and 4-17-00. See Pl.'s Br. Opp. at 13. Nevertheless, even if the Court considers both Benes' filing of grievances as well as his EEOC charges as the protected activity he was engaged in, Plaintiff still fails to establish the causal link that "but for" this protected conduct the Defendant's decisions not to promote him to the above noted positions would have been different. See Long, 88 F.3d at 304 n. 4.

FN6. Moreover, Plaintiff complains that Defendant further violated Title VII by
(a) failing to provide him with employment conditions and relationships where he could safely work, free from disparate treatment;
(b) failed to respond promptly to his complaints of disparate treatment;
(c) failed to timely, thoroughly investigate his complaints;
(d) failed to timely take appropriate action when it knew or should have known of the disparate treatment; and
(e) failed to timely discharge the supervisors and/or co-workers who perpetrated the discriminatory treatment against him.
See Compl. at 48.

Plaintiff argues that the close timing between the filing of his grievances and/or the EEOC complaints here and the asserted non-promotions discussed above, justifies an inference of a retaliatory motive on the part of the Defendant that satisfies the required "but for" causal connection to make out a prima facie case. See Pl.'s Br. Opp. at 12. Meanwhile, Defendant City counters that there is no suspect timing here, and regardless, the mere fact than an adverse employment action chronologically follows a

protected activity, standing alone, is insufficient to establish the requisite causal link. See Def.'s Reply at 12. That some adverse action is taken after an employee engages in some protected activity will not always be enough for a prima facie case. Swanson v. Gen. Serv. Admin., 110 F.3d 1180, 1188 n. 3 (5th Cir.1997); see also Dickerson v. Metro. Dade County, 659 F.2d 574, 580 (5th Cir. Unit B 1981) (not every employee who is fired after having filed charges with the EEOC will fall within the protective ambit of Title VII). However, the Fifth Circuit has held that close timing between an employee's protected activity and an adverse action against him may provide the "causal connection" required to make out a prima facie case of retaliation. Swanson, 110 F.3d at 1188.

However, even assuming that the short lapse of time between the filing of grievances and/or EEOC charges and Plaintiff's non-promotions here can establish a prima facie case of retaliation, the Court finds it is not sufficient to assert that Defendant's articulated reasons for Benes' non-promotions are pretextual. Once the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing of it, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive. See Swanson, 110 F.3d at 1188 (emphasis added). The Court finds that Benes here has not produced any such evidence to counter Defendant's nondiscriminatory reasons, save only to say that his evidence of retaliation is so intertwined with the continuous discriminatory treatment he has alleged that it is impossible for him to separate the two of them. See Pl.'s Br. Opp. at 12. His subjective beliefs and conclusory statements alone are insufficient as no reasonable jury could hold in this case that the City of Dallas retaliated against him because of the filing of his discrimination charges. See Musgrove, 1999 WL 1080931 at *6. Having failed to establish the requisite causal link between his charges and Defendant's actions, "i.e., that absent retaliation he would have been promoted," see Jones,

793 F.2d at 725, summary judgment shall be granted to Defendant City on these claims.

V. Fourteenth Amendment and Section 1983 and 1985 Claims

Benes also alleges here that the conduct of the Defendant City of Dallas violated rights independent of Title VII, including his right to testify without retaliation, and that such unlawful employment practices encroached upon his constitutional rights under 42 U.S.C. §§ 1983 and 1985. Compl. at 50.

Neither Section 1983 nor Section 1985 create substantive rights, but rather provide a right of action for a violation of statutory or constitutional rights. See McGregor v. Louisiana State Univ. Bd. of Sup'rs, 3 F.3d 850, 867 (5th Cir.1993). Having already held that Benes cannot establish a violation under either Title VII, the ADEA, or Section 1981, these rights cannot form the basis for his Section 1983 and 1985 claims. The Court shall therefore limit its analysis to the allegations that Plaintiff's rights to equal protection under the 14th Amendment were violated by the Defendant. See Compl. at 50.

The standard for determining whether a prima facie case of discrimination has been established is identical under Title VII and Section 1983 equal protection claims. See Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047-1048 (5th Cir.1996). Because the Court has also concluded that Plaintiff's Title VII claims fail as a matter of law, his equal protection claims against the Defendant must also fail. Benes' mere conclusory allegations of the existence of an unconstitutional policy or custom is not sufficient to sustain his claims under Section 1983. Moreover, "the absence of foundation for § 1983 liability precludes a § 1985 conspiracy claim predicated on the same allegations." Riggs v. City of Pearland, 177 F.R.D. 395, 409 (S.D.Tex.1997). Accordingly, the Court shall grant summary judgment to the Defendant on these claims.

CONCLUSION

For the reasons stated above, having considered the summary judgment evidence, the applicable law, and the parties' arguments, the Court is of the opinion that Defendant's Motion for Summary Judgment shall be and is hereby GRANTED. Further, the Court is the opinion that Plaintiff's Motion to Abate Ruling on Defendant's Motion shall be and is hereby DENIED.

IT IS SO ORDERED.
Signed this 26th day of February, 2002

s/ JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANTISEK BENES, P.E.	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	3:99-CV-0771-P
	§	
CITY OF DALLAS,	§	
Defendant.	§	

FINAL JUDGMENT

Pursuant to the Memorandum Opinion and Order filed on February 26, 2002, the Court issues judgment as follows:

It is ORDERED ADJUDGED and DECREED that,

1. Plaintiff takes nothing from his claims against defendant.
2. Accordingly, costs incurred by the defendant shall be assessed against plaintiff.

IT IS SO ORDERED.

Signed this 26th day of February, 2002 at Dallas, Texas.

s/ JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FRANTISEK BENES, P.E.	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	3:99-CV-0771-P
	§	
CITY OF DALLAS,	§	
Defendant.	§	Entered May 16, 2002 U.S.D.C.

ORDER

Now before the Court are the following:

1. Plaintiff's Motion to Reconsider Final Judgment Order and Final Judgment Dated February 26, 2002, and or Motion for New Trial and Motion to Extend the Ten Day Deadline for Filling Such Motion, filed March 20, 2002;
2. Defendant's Reply to Plaintiff's Motion to Reconsider Final Judgment Order and Final Judgment Dated February 26, 2002, and or Motion for New Trial and Motion to Extend the Ten Day Deadline for Filling Such Motion, filed March 28, 2002; and
3. Plaintiff's Supplemental Affidavit in Support of his Motion for New Trial and/or in Reconsideration of the Final Judgment, filed April 4, 2002.

After considering the pleadings, the parties' briefs and supplemental materials, and the relevant authorities, for the reasons stated below, this Court is of the opinion that Plaintiff's Motion to Reconsider the Order granting

summary judgment to Defendant should be DENIED and Plaintiff's alternative Motion for New trial and to Extend Deadlines should be DENIED.

BACKGROUND

Plaintiff Frantisek Benes brought this action against the City of Dallas on April 7, 1999, and filed a First Amended Original Complaint on October 19, 2000, asserting a right to recovery under Title VII, the Age Discrimination in Employment Act ("ADEA") Sections 1981, 1983 and 1985, and the 14th Amendment to the United States Constitution. See generally Pl.'s Orig Compl. Specifically, Plaintiff asserted that he had been treated disparately and suffered retaliation through his career with the City because of his national origin (Czechoslovakian), race (White), and age (47) as compared to other similarly situated co-workers. In a Memorandum Opinion and Order dated February 26, 2002, the Court granted Defendant's motion for summary judgment by finding (1) most of Plaintiff's claims were time-bared; (2) Plaintiff could not establish a prima facie cases on several of his claims; (3) Plaintiff could not adduce evidence sufficient to permit a reasonable trier of fact to find that the City's articulated reasons for its employment decisions were pretextual, or that "but for" his protected activity the City would not have taken the action in question; and (4) he could not establish statutory or constitutional violations to permit recovery under Sections 1981, 1983 and/or 1985. See Mem. Opinion & Order dated 2/26/02 at 11-29.

Benes now moves for reconsideration of the Court's February 26, 2002 Order claiming that his charge of continuous "Pay Discrimination" for the period of 1989 to the present was not challenged by the City and was not otherwise dealt with by the Court. Pl.'s Mot. to Recons. At 1-2. In the alternative, Plaintiff asks this Court grant him a New Trial regard to the Court's Final Judgment Order dated February 26, 2002. Id at 4.

DISCUSSION

A party has ten days from the entry of judgment in which to file post-trial motions, including a renewed motion for judgment as a matter of law, a motion for a new trial, and a motion to amend or alter a judgment. Fed. R. Civ. P. 50(b), 59(b) & (e). The requirement that post-trial motions be filed within the relevant ten-day period after entry of judgment is jurisdictional, and may not be extended by a waiver of the parties or by a rule of the district court. United States Leather, Inc. v. H&W Partnership, 60 F.3d 222, 225 (5th Cir. 1995) (Citing Vincent v. Consolidated Operating Co., 17 F.3d 782, 785 (5th Cir. 1994)). The mover's failure to serve the motion within the ten day limit deprives the district court of jurisdiction to alter or reconsider its earlier judgment. Id., (citing Flores v. Procunier, 745 F.2d 338, 339 (5th Cir. 1984)). As Plaintiff's Motion to Reconsider in this case was not filled until 22 days after entry of this Court's Order granting summary judgment for Defendant, the Court lacks jurisdiction to alter or reconsider its earlier judgment pursuant to Rule 59.

Nevertheless, if a motion is filed more than ten days after entry of judgment and includes allegations necessary for relief, the Court may treat it as a motion under Federal Rules of Civil Procedure 60(b). See Pryor v. U.S. Postal Service, 769 F.2d 281, 285 (5th Cir. 1985); see also Tran v. Kaiser Foundation Health Plan of Texas, No. Civ.A. 3:00-CV-1559-P, 2001 WL 1082418 at *1 (N.D. Tex. Sep 07, 2001). Rule 60(b) provides for relief from a final judgment or order under the following circumstances:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Due to the interest in finality, motions for reconsideration are generally granted only when the moving party shows there was a mistake of law or fact or presents newly discovered evidence that could not have been discovered previously. Lejano v. K.S. Bandak, No. Civ.A. 00-2990, 2000 WL 33416866, at *5 (E.D. La. Nov. 3, 2000). In this case, Plaintiff has not offered any new law or new facts uncovered since the Court's Order bearing on its previous determination. Rather, he merely repeats the arguments he made in his first motion for reconsideration. Namely that Plaintiff was given the minimum allowable salary for every position he worked in for the Defendant since 1989 to the present, thereby creating a "continuing violation" where each pay period constituted a distinct illegal act continuously up to now. See Pl.'s Mot. For Recons. At 2-4. Nevertheless, in its previous order the Court specifically found that Benes could not employ the continuing violation theory to resurrect claims about pay discrimination concluded in the past, even though its effects persisted. See Mem. Opinion & Order at 12-13 (citing Berry v. Board of Sup'rs of L.S.U. 715 F.2d 971, 979 (5th Cir. 1983)). Therefore, as Plaintiff has not raised any of the grounds cognizable for relief under Rule 60(b), the Court shall deny his Motion for Reconsideration, and shall also deny his Alternative motion

for a New Trial. See In re Stangel, 68 F.3d 857, 859 (5th Cir. Tex.).

CONCLUSION

Accordingly, upon careful consideration of the parties' arguments and applicable law, the Court finds that Plaintiff's Motion to Reconsider the Court's Order granting summary judgment to Defendant shall and is hereby DENIED. Further, Plaintiff's alternative Motion for New Trial and to Extend Deadlines shall and is hereby DENIED.

So Ordered.

Signed this 15th day of May, 2002.

s/ JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE